No. 80-1286

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In the

# Supreme Court of the United States

OCTOBER TERM, 1980

F. W. WOOLWORTH CO.,

*Petitioner,*

*vs.*

GERALD FELL, CLIFFORD KENDRICKS, and ERNEST TURNER,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Respondents, Gerald Fell, Clifford Kendricks, and Ernest Turner, hereinafter sometimes referred to as "the employees," respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in this case.

## STATEMENT OF THE CASE[1]

### A. Procedural History

Petitioner states that the issue submitted to arbitration was whether the Company had just cause for its discharge of the respondent employees under the terms of its collective bargaining agreement with the Teamsters Union. Petitioner omits mention that the question of the appropriate remedy if the discharge was found not to be for just cause was also submitted to the arbitrator. (Appendix G, at p. 42a; Appendix A at p. 21 a.)[2]

A second point which should be mentioned in the procedural history is that although served with copies of the employees' motions to intervene of June 22 and July 6, 1979, at no time did the Union indicate opposition to such motions or to the employees' prosecution of their appeal of the district court's decision. (Appendix A at pp. 11a and 12a; Petitioner's Brief at p. 4.)

### B. Facts

Petitioner states that the employees were discharged for violating Rule 10, pertaining to attendance. In fact, they were not discharged for violating Rule 10 as written but for violating the *unwritten* interpretation of Rule 10. (Appendix A at p. 4a; Appendix G at p. 44a.) After their discharges each employee, not the Teamsters Union as stated by the petitioner, filed grievances. (Appendix B at p. 30a; Appendix G at p. 45a.)

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[1] Pursuant to Rule 34 of the Supreme Court Rules, respondents will limit this section of their brief in opposition to the petition to noting errors or omissions of fact which appear in petitioner's statement of the case.

[2] References herein to appendices refer to the appendices which were attached to the Petition for a Writ of Certiorari.

Petitioner, while noting that each employee was discharged for violating Company Rule 10, omits to mention a fact emphasized by the majority decision of the Court of Appeals, namely, that the Company's rules, which appear as an appendix to the Court of Appeals decision, are divided into three sections with the following headings: (1) RULES PERTAINING TO SAFETY, FIRE PREVENTION AND SANITATION (Rules 1-7); (2) RULES PERTAINING TO ATTENDANCE (Rules 8-10); and (3) CAUSES FOR DISCHARGE PERTAINING TO WORK (Rules 11-22). Rule 19 specifically provides that violation of the first seven rules which pertain to safety, fire prevention and sanitation would be cause for discharge. There is no statement in the rules that violation of the attendance rules would be cause for discharge except that Rule 10 itself states that excessive absenteeism would be cause for discharge but does not specify a penalty for failure to notify the Company of an absence. (Appendix A at pages 19a and 22a-24a.)

At footnote 3, page 7 of its petition for a writ of certiorari, Petitioner states that the arbitrator "did not find any instances of application of a lesser penalty for violation of" Rule 10. Petitioner omits mention of the arbitrator's findings that "employees who are hospitalized, on Workmen's Compensation, injured in a car accident, on Jury Duty or on funeral leave are not required to call in every three days" and that "other extenuating circumstances, if they are clear and understandable, may also provide relief from the three days rule." (Appendix G at p. 44a.) The arbitrator also expressly found that the rule does not "provide for absolute discharge." (Appendix G at p. 49a.)

## SUMMARY OF ARGUMENT

I. The majority opinion below does not conflict with this Court's opinions in *Maddox, Vaca,* or *Hines.*[3] The employees here have fully complied with the grievance procedure, are taking a position consistent with that pursued by their union throughout the latter's processing of their grievances; and are seeking to sustain the arbitration award, not upset it. Nor does the majority decision conflict with the Fifth Circuit's decision in *Acuff,*[4] because there the employees were seeking to vacate the arbitration award and were in conflict with their union which had an interest in upholding the award to protect the jobs of numerous other employees who had been reinstated to employment by the arbitrator. Here the employees are attempting to confirm the arbitration decision, and there is no suggestion of any conflict between the employees and the interest of the Union.

The arbitrator issued an award in favor of the employees and they have legitimate expectations that the arbitrator's award will be complied with. The Union unsuccessfully resisted an effort by the Company to vacate the arbitration award in the district court, but made no effort to appeal the district court's decision. Respondents promptly moved to intervene and process an appeal on their own. The Union did not oppose respondents' intervention or appeal.

No federal labor law policy is promoted by denying the individual employees a right to intervene to protect

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[3] *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965); *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976)

[4] *Acuff* v. *United Paper Makers and Paper Workers,* 404 F. 2d 169 (5th Cir. 1968), cert. den. 394 U.S. 987 (1969)

their legitimate expectations that the arbitrator's award would be lived up to by the Company as required by the labor agreement. At a minimum, given the vested interests of the employees and the fact that the latter are merely complementing prior activities of the Union, the Union should be required to state its opposition to the employees' intervention before a court would be entitled to conclude that some interest of the Union is being undermined by permitting intervention. Absent any affirmative indication of opposition by the Union, there is no basis for invoking the doctrine of breach of duty of fair representation to defeat the right of respondent employees to intervene and prosecute their appeal in order to enforce the arbitration award which, as the court below stated, "was the culmination of the grievance procedure provided under the collective bargaining agreement."

II. There is no conflict between the Seventh Circuit's decision upholding the arbitrator's award and decisions of this Court or decisions of other circuits. The petitioner's argument is no more than a disagreement of contract interpretation. The arbitrator had the authority to settle the contractual dispute, and the Court of Appeals, in reversing the district court's vacation of the arbitrator's award, did no more than uphold the limited role of courts in the interpretation of collective bargaining agreements.

More than twenty years ago, this Court brought stability to collective bargaining relations by holding in the *Steelworkers Trilogy*[5] that courts must defer to the in-

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[5] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574; *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

terpretation of the arbitrator when the collective bargaining agreement provides for final and binding arbitration of grievances or disputes regarding contract interpretation. In the present case where the pertinent contract clause relied on by the Company in support of its discharge action is read together with the plant rules to which the clause refers, there is an obvious ambiguity regarding the meaning of the clause. The arbitrator resolved that ambiguity and held that the rule under which the employees were discharged did not require or warrant discharge in the circumstances of the particular grievances and taking into account the common law of the shop. He, therefore, set aside the discharges and ordered lengthy suspensions for each of the employees in lieu of discharge. This was well within the authority of the arbitrator under the agreement and the discretion granted him under the decisions of this Court.

## ARGUMENT

### I. Contrary to petitioner's assertion, the Court of Appeals' holding that the individual employees had standing to intervene to prosecute an appeal of the district court's vacation of the arbitration award setting aside their discharges does not conflict with the applicable decisions of this Court or with a decision of the Fifth Circuit.

The petitioner argues that "the majority decision of the Seventh Circuit is in conflict with the rule established by this Court in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), *Vaca* v. *Sipes,* 386 U.S. 171 (1967), and *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), and with the decision of the United States Court of Appeals for the Fifth Circuit in *Acuff* v. *United Paper Makers & Paper Workers, AFL-CIO,* 404 F. 2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987 (1969). We shall discuss each of those decisions and show that there is no conflict between them and the majority opinion of the Court of Appeals in this case.

In *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650 (1965), three years after his employment was terminated, an employee brought suit in a state court against his employer for breach of contract, claiming that he was entitled to severance pay. The collective bargaining agreement contained a three-step grievance procedure, "capped with binding arbitration of matters not satisfactorily settled by the initial steps." 379 U.S. at 658. The employee made no effort to use the contract grievance procedure to obtain redress through the union. The court held that:

> Individual employees wishing to assert contract grievances must *attempt* to use of the contract grievance

> procedure agreed upon by the employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. (Footnotes and citations omitted.)

In the present case the employees did use the contract grievance procedure and have afforded the Union the opportunity to act on their behalf. The Union, indeed, was successful in prosecuting respondents' claims in arbitration, the culminating step of the grievance procedure. As the Court of Appeals held, the employees "are merely complementing the activities of the Union and seeking to vindicate the purposes for which the Union undertook their representation in the first place." (Appendix A, at p. 14a.) The action of the Court of Appeals has strengthened "the grievance procedure by increasing the possibility that the arbitrator's decision will be upheld through review of a district court order vacating that decision." (Appendix A, at p. 13a.)

*Vaca* v. *Sipes*, 386 U.S. 171 (1967), was a suit by an employee against his union for damages because of its refusal to process his discharge grievance to arbitration. The Court held that the state court had applied the wrong standard to define a union's duty of fairness toward represented employees and reversed the judgment awarding compensatory and punitive damages to the employee. To establish a violation of the duty of fair representation, the Court ruled, the employee must prove "arbitrary or bad-faith conduct on the part of the Union in pro-

cessing his grievance." 386 U.S. at 193. The Court further held that in an action against his employer for breach of contract an employee will be excused from the exhaustion of remedy requirement upon proving that the union's refusal to process his grievance was in violation of its duty of fair representation.

Unlike *Vaca*, the employees in the present case not only are not suing their union for breach of the duty of fair representation, but they are taking a position consistent with that pursued by the Union throughout the latter's processing of respondents' discharge grievances. *Vaca*, therefore, in no way conflicts with the Court of Appeals ruling in this case regarding respondents' right to intervene and process an appeal of the district court's decision vacating the arbitration award.

The lack of conflict is unmistakably clear when one considers the reasons stated by the Court in *Vaca* for its holding that an employee may not sue for breach of contract unless he can show that the union refused to process his grievance to arbitration in violation of the latter's duty of fair representation. One reason emphasized by the Court was that if "the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation." 386 U.S. at 191. This concern of the Court clearly has no application where, as here, the Union has been afforded complete freedom regarding settlement efforts and the decision whether to go to arbitration. It was the Union and not the employees who determined to pursue their discharges to arbitration. In

fact, arbitration has already been had, so that there is no question of exhaustion of contractual remedies. It was the Union also who decided to resist the Company's effort in the district court to vacate the arbitrator's award ordering reinstatement of the discharged employees. The employees thereby followed in their Union's footsteps in prosecuting the appeal of the district court's ruling overturning the arbitrator's award, and, as stated by the Court of Appeals, "are merely seeking the ultimate vindication of the arbitration process which the Union originally demanded and has consistently pursued and which Woolworth repudiated by seeking to have the arbitration award set aside." (Appendix A. at p. 12a.)

The *Vaca* Court also expressed concern that allowing the individual employee to compel arbitration would permit a significantly greater number of grievances to proceed to arbitration and thereby greatly increase the cost of the grievance machinery and overburden the arbitration process. 386 U.S. at 191. Allowing the employees to intervene in order to prosecute their appeal, as the Court of Appeals pointed out, "strengthens the grievance procedure by increasing the possibility that the arbitrator's decision will be upheld through review of a district court order vacating that decision." (Appendix A, at p. 13a.) To sustain the Company's position would be to weaken the grievance-arbitration machinery and encourage expensive litigation in hopes of overturning unfavorable arbitration awards. On the other hand, allowing employees to intervene to prosecute their appeal in support of the arbitration award, as the Court of Appeals declared, "does not increase the cost of the arbitration process by increasing the number of cases arbitrated or decrease the union's ability to decide which cases to submit to arbitration." (Appendix A, at p. 13a.)

*Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), was a suit by discharged employees against their employer and the union after the issuance of an arbitration award sustaining their discharges. The suit alleged wrongful discharge by the employer and a breach of the duty of fair representation by the union. The union denied the charges. The Court reversed the lower court's dismissal of the action and held that the employees, "if they prove an erroneous discharge and the Union's breach of duty tainting the decision of the [arbitration] committee, are entitled to an appropriate remedy against the employer as well as the Union." 424 U.S. at 572.

It is clear that *Hines* has no bearing on the issues in the present case. If respondents were attempting to overturn an arbitration award as were the employees in *Hines* there would be a requirement to show a breach of the duty of fair representation. Respondents, however, are seeking to confirm the arbitration award. It would not make sense in such circumstances to require a showing of violation of the duty to represent fairly. In addition, unlike the situation in *Hines,* respondents here are not suing their union but, on the contrary, are pursuing to its conclusion the same course initiated by the Union, supported by it in the district court, and never opposed by it before the Court of Appeals or elsewhere.[6]

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[6] There is a strong statement by the Court in *Hines* favoring the resolution of grievances and contract disputes by arbitration and disapproving of the intrusion of courts in the review of the merits of arbitration awards (424 U.S. at 562-563.):

> Courts are not to usurp those functions which collective bargaining contracts have properly "entrusted to the arbitration panel." (citation omitted.) They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes.

Finally, *Acuff* v. *United Paper Makers & Paper Workers, AFL-CIO*, 404 F. 2d 169 (5th Cir. 1968), cert. denied, 394 U.S. 987 (1969), is in no way inconsistent with the Court of Appeals ruling below. In *Acuff* the employer refused the union's demand to arbitrate the grievances of 63 employees for engaging in an unauthorized work stoppage. The union brought suit to compel arbitration, and eventually the employer entered into a stipulation with the union to arbitrate. The arbitrator denied the grievances of sixteen employees because of their conduct during the strike but ordered that the discharges of the remaining employees be reduced to disciplinary layoffs and that they be reinstated without loss of seniority but with no back pay.

The employees whose grievances were denied entirely and some of those whose grievances were denied in part filed motions to intervene, together with complaints and motions to vacate the arbitration award. The district court denied the motion to intervene and the Court of Appeals affirmed the lower court's decision. The Court of Appeals below correctly pointed out that *Acuff* has no bearing on the instant case both because the union there opposed intervention[7] and because the individual employees were

[7] Although the Fifth Circuit's opinion in *Acuff* does not expressly state that the union opposed intervention by the individual employees, it is clear, as pointed out in the text below, that the union could not have supported the complaint to vacate the arbitration award because to do so would jeopardize the jobs of the employees who were reinstated by the arbitrator and were not contesting the award. There was, therefore, a clear conflict between the union and the employees attempting to intervene in *Acuff*. No such conflict is present between respondents and the Union in the instant case.

attempting to *set aside* the arbitration award (Appendix A, at pages 8a and 10a.) In the present case, the positions of the parties are precisely the opposite of what they were in *Acuff*. Here the employees seek to uphold federal labor policy supporting arbitration awards and it is the employer that seeks to repudiate that policy.[8]

The petitioner raises several hypotheticals in its argument which it contends show up the faulty logic of the Court of Appeals decision below. It states that presumably the majority would hold that the individual employees would be entitled to intervene if the Union failed to oppose the Company's action to vacate the award in the district court in the first instance, or to petition for a rehearing by the Court of Appeals or for a writ of certiorari to this Court if the Union had appealed unsuccessfully to the Court of Appeals. "In short," the petitioner asserts, "if a union prevails before an arbitrator, it must thereafter look over its shoulder at the individual employees, who may individually usurp its representative functions should it stop at any point short of a final and unrevocable determination by this Court." (Petition, at p. 11.)

What the foregoing argument overlooks or ignores is that under the approach of the Court of Appeals below the Union need only voice its objection to intervention by the individual employees or register opposition to the position taken by the employees in order to exclude them from any role before the district court or on appeal. Thus

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[8] Section 203(d) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §173(d) provides: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes."

the Court of Appeals stated, "If there were even any colorable conflict between the individual employees and the Union as to whether an appeal ought to be taken or as to what stance ought to be taken on appeal, we assume that the Union might prevail in the balancing process which we have essayed." (Appendix A, at pp. 12a-13a.)[9]

Petitioner closes its eyes to the fact that respondents "have a direct interest in the arbitration award which is the subject of the instant suit because the award ordered Woolworth to reinstate them." (Appendix A, at p. 15a). Except for the limitations imposed by federal substantive labor law which requires the exhaustion of collective bargaining grievance procedures [*Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965)] and places the union in control of the grievance procedure [*Vaca* v. *Sipes,* 386 U.S. 171 (1967)], an individual employee would have the right to sue his employer directly for wrongful discharge

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[9] Petitioner also raises the hypothetical of the arbitrator deciding one employee's grievance in the present case in favor of the Company and the other two in favor of the Union. If the "district court vacated that portion of the award favorable to the Union," the Petitioner asserts, "the employee whose claim had been lost in arbitration would not have standing to intervene and appeal under the Seventh Circuit decision" but "the two whose claims had been successfully presented in arbitration would have standing to appeal, although all three employees would be in precisely the same situation as to both the Company and the Union." (Petition at p. 12.) First it should be noted that this example is farfetched. We are not aware of any case where a court has vacated only part of an arbitration award but enforced the remainder. Secondly, the example has omitted an important part of the equation. The relation of the employee vis-a-vis the Company and the Union is not the only factor to be considered. An equally critical element is whether the employee's action is in support of or in opposition to the arbitration award.

in violation of a collective bargaining agreement. Thus, in *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976) this Court stated:

> Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications, §301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge. *Smith* v. *Evening News Association, supra,* 371 U.S., at 198-200.

In the present case, the contractual grievance procedure has been fully complied with. The Union has been in control of the grievance procedure throughout the processing of the grievance and was successful in obtaining an arbitration award ordering reinstatement of the grievants. The Union also resisted an attempt by the Company in the district court to vacate the arbitration award but was unsuccessful in that effort. When the individual employees learned that the Union was not going to appeal the district court's decision, they promptly moved to intervene and process an appeal on their own. The rationale of *Smith* v. *Evening News, Vaca,* and *Hines, supra,* requires that there be a showing that some policy of federal labor law or some interest of the Union would be served by denying individual employees the right to intervene and prosecute an appeal of a district court decision vacating an arbitration award finding that they were wrongfully discharged.

Our previous discussion in connection with *Vaca, Maddox* and *Hines,* has shown that no federal labor law policy is promoted by denying intervention in the circumstances of this case. The Court of Appeals also so concluded in its consideration of the applicable cases. (Appendix A, at

p. 13a.) So far as the interest of the Union is concerned, where, as here, the employees intervene in support of the award which the Union itself successfully obtained before the arbitrator, at a minimum the Union should be required to state its opposition to the employees' intervention before a court would be entitled to conclude that some interest of the Union is being undermined by permitting intervention. As the Court of Appeals stated, "So long as the employees intervene in support of the award and without the opposition—formal or informal—of the Union, they are merely complementing the activities of the Union and seeking to vindicate the purposes for which the Union undertook their representation in the first place." (Appendix A, at p. 14a.)

The petitioner asserts in its brief that "to require a union to oppose employee enforcement actions expressly and publicly, imposes upon the union an untenable burden to place itself in public political disagreement with its members" and that "union compliance with such requirement might compel a finding of bad faith toward the individual employees—a breach of the duty of fair representation—this creating an individual right, under *Vaca, Maddox* and *Hines,* to enforce the contract." (Petition, p. 13.)

If, as petitioner contends, the Union desires that the individual emplopees not pursue an appeal in support of the arbitration award, there is no basis for fearing a finding of a breach of the duty of fair representation provided the grounds of the Union's opposition are not tainted by arbitrary or bad faith considerations. The law is clear that a union can be charged with breach of the duty of fair representation for deciding not to process a grievance or failing to enforce compliance with a labor contract only if it acts arbitrarily or in bad faith. *Vaca, supra.* For the petitioner to assert that express opposition

to an employee enforcement action might constitute a breach of the duty of fair representation is tantamount to admitting that the Union would be acting arbitrarily or in bad faith to oppose respondents' intervention and prosecution of their appeal in this case.

The fact is, however, that the question of the breach of duty of fair representation is irrelevant in this case. The doctrine of fair representation comes into play when an individual employee wishes to challenge the way in which his union representative has applied the contractual grievance procedure in respect to the employee's grievance or complaint. Thus in *Vaca* the individual employee challenged the union's decision not to take his discharge case to arbitration. The Court reviewed the union's reasons for deciding not to arbitrate the discharge, found that no breach of the duty of fair representation occurred because the union had acted in good faith and had reasonable grounds for refusing to arbitrate, and reversed a damage award to the employee by a state court. In *Hines,* individual employees sued their employer and their union after an award by the arbitration tribunal had issued upholding their discharges. The Court held that it was error to dismiss the suit against the employer where the accompanying Complaint against the union alleging bad faith on the part of the union in connection with the arbitration proceedings had withstood a motion for summary judgment.

In *Acuff,* relied on so strongly by petitioner, the individual employees sought to intervene in a suit to compel arbitration and to have the arbitration award upholding their discharges or other discipline vacated. The same award which the discharged employees sought to vacate had also ordered the reinstatement of numerous other employees who were not contesting the award. The union,

contrary to the employees, did not seek to set aside the award. The court held that the union had fairly represented the employees and that they were, therefore, not entitled to intervene or to proceed with their complaint to vacate the arbitration award.

In all of the foregoing cases the doctrine of the duty of fair representation has been invoked by employees or the court as a basis of granting or denying individual employees the right to seek personal redress because of a union's refusal to process their grievance or because of *dissatisfaction* with the outcome of arbitration proceedings. In all of these cases "the duty of fair representation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' " *Hines, supra* at 564 (1976), quoting *Vaca, supra* at 182 (1967).

In the present case, unlike in *Vaca,* the individual employees are not dissatisfied with or contesting the manner in which the Union processed their grievances. Nor are they attempting to vacate the arbitration award as in *Acuff* or in *Hines.* Their position in no way conflicts with that of the Union as in *Acuff* where the arbitration award was favorable to a majority of the employees who were not contesting it and where the union would have risked jeopardizing the jobs of those employees by supporting the other employees' efforts to vacate the award. Here the Union has consistently supported the grievances of the employees, has presented them to successful arbitration and has resisted the effort of the employer to vacate the award in the district court. In short, there is no basis for invoking the doctrine of breach of duty of fair representation to defeat the right of respondent employees to intervene and prosecute their appeal in order to enforce the arbitration award "which was the culmination of the

grievance procedure provided under the collective bargaining agreement." (Appendix A, at pp. 14a-15a.)

Petitioner misinterprets the Court of Appeals decision where it attributes to the majority below the holding or conclusion "that the contract's exclusivity of enforcement provision does not extend beyond arbitration" (Petition, p. 14.) What the court stated was that "the grievance procedure as such culminates in the arbitration award and does not include suits brought under §301(a) to vacate the award." (Appendix A, at p. 11a.) This is consistent with this Court's own statement in *Hines* that courts "should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes." 424 U.S. at 563. "[P]lenary review by a court of the merits," this Court declared, "would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960).

Petitioner argues that under "the rule of *Vaca*, it makes no difference *when* the union chooses not to process a grievance further" and that logically "no further substantive rights should be afforded employees seeking intervention simply because they do so *after* issuance of an award. . ." (Petition, at p. 14). The court below, however, did not rest its decision on the mere timing of the petition to intervene. The court recognized that there are circumstances wherein it would not be appropriate to permit intervention by individual employees after an award is issued. Thus the court stated: "The decisional authority governing the rights of individual members to participate in the process of dispute resolution after arbitration suggests that individual members may not bring suit in an attempt to have the award set aside. [Citation omitted]

Nor may they intervene in an on-going action in order to vacate an award, particularly in opposition to the union. See *Acuff, supra.*" (Appendix A, at p. 11a.)

The critical distinctions for the court between this case and the cases relied on by the Petitioner were (1) the employees are defending and not attacking the arbitration award; (2) the Union has taken a position in the district court in defense of the award; (3) the Union has not objected to the employee's intervention on appeal and there is no conflict between the Union's interest as representative of the bargaining unit as a whole and the individual employees' interest in confirming the award; (4) in the absence of intervention the employees lose their final day in court. (Appendix A, at pp. 14a-15a.)

Of the four factors relied on by the majority below, respondents believe that the most critical is that the employees are defending and not attacking the arbitration award. The importance of deference to and the finality of the decision of the tribunal chosen by the parties to settle their disputes is fundamental to federal labor law as declared both by Congress and this Court. See, Sec. 203(d) of the L.M.R.A., as amended, 29 U.S.C. §173(d); *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). Where, as here, permitting intervention by individual employees would support the principle of finality of an arbitration award, it should be viewed with approval by the courts. Where, as in *Acuff*, intervention by employees is for the purpose of attacking an arbitration award it should be looked upon with disfavor.

There patently is no substance to the petitioner's contention that the decision of the court below regarding the right of individual employees to intervene in the present suit conflicts with prior decisions of this Court or with a decision of the Fifth Circuit. As the court below de-

clared, "Any argument that the contractual function of the union in deciding which grievances should be pursued would be undermined by allowing these employees to take this appeal is quite specious." With an arbitration award having issued in their favor, an "approach which denies these employees their ultimate day in court subverts justice in the name of meaningless abstractions disguised as substantive labor law." (Appendix A, at p. 14a.)

**II. Article X of the collective bargaining agreement when read together with the plant rules to which it refers is manifestly ambiguous. The arbitrator properly resolved the ambiguity, and under the longstanding decisions of this Court, the Seventh Circuit correctly sustained his award.**

Enforcement of arbitration awards is an area of labor law which has been settled for more than twenty years. In the *Steelworkers Trilogy*,[10] this Court interpreted national labor policy and determined that where a collective bargaining agreement provides for a detailed grievance procedure culminating in arbitration, the interpretation of that agreement is for the arbitrator and not for the courts. As a substitute for industrial strife, "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers of America* v. *Warrior & Gulf Navigation Company, supra,* at p. 578. Provided that the arbitrator's decision can in some rational manner be supported by the agreement, the function of the courts is a limited one. The merits of the grievance, the balance of the equities, the meaning imposed by the parties upon the particular language used are all questions for the arbi-

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[10] *United Steelworkers of America* v. *American Manufacturing Co., supra; United Steelworkers of America* v. *Warrior & Gulf Navigation Company, supra; United Steelworkers of America* v. *Enterprise Wheel and Car Corp., supra.*

trator. *United Steelworkers of America* v. *American Manufacturing Co., supra,* at p. 568. "It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America* v. *Enterprise Wheel and Car Corp., supra* at p. 599. This Court and all courts of appeal have consistently followed this policy. See, *Vaca* v. *Sipes, supra,* and *Hines* v. *Anchor Motor Freight, Inc., supra.*

The thrust of the petitioner's argument that the Seventh Circuit was wrong in upholding the arbitration award is based upon the petitioner's interpretation that the collective bargaining agreement permitted no discipline less than discharge if the arbitrator found *any* violation of *any* Company rule. The arbitrator interpreted the agreement differently, and the Court of Appeals found that the arbitrator's award drew its essence from the collective bargaining agreement. Initially, it was manifest to the Court of Appeals that the Article X of the contract, providing that a violation of any Company rule shall be considered a just cause could not be applied without an examination of the rules themselves.[11] The rules are divided

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[11] See 3 Corbin, *Contracts,* §536, at 27-28:

"[S]eldom in a litigated case do the words of a contract carry one identical meaning to the two contracting parties or to third persons. Therefore, it is invariably necessary, before a court can give any meaning to the words of a contract and can select one meaning rather than other possible ones as the basis for the determination of rights and other legal effects, that extrinsic evidence shall be heard to make the court aware of the "surrounding circumstances," including the persons, objects, and events to which the words can be applied and which caused the words to be used."

into three sections: RULES PERTAINING TO SAFETY, FIRE PREVENTION AND SANITATION; RULES PERTAINING TO ATTENDANCE; and CAUSES OF DISCHARGE PERTAINING TO WORK.[12] The first and third sections are linked together by Rule 19, which specifically provides that violation of the safety rules is a basis for discharge. However, Rule 10, which is in the second section of the rules, does not provide for discharge except in cases of excessive absenteeism (not pertinent here). If Article X was intended to be read literally as requiring or permitting discharge in all instances of a rule violation, none of this elaborate categorization and cross-reference would have been necessary. Plainly, when Article X is read together with the plant rules to which it refers, its meaning is not clear and it cries out for interpretation.

The arbitrator held that Rule 10 does *not* "provide for absolute discharge" and that an employee who fails to report for three days is only "subject to discharge." Discharge is not automatic and must otherwise meet the just cause standard. Reviewing all of the facts and evidence, the arbitrator concluded that the violation of Rule 10 here was only "technical" and that the just cause standard for discharge provided for in Article X had not been met. This was perfectly permissable despite the fact that Article X states that "Violation of any Company rule shall be considered a just cause" because the arbitrator read this sentence to refer only to the group of rules which Woolworth itself had designated "CAUSES FOR DISCHARGE." The arbitrator was not bound to find that any violation of Rule 10 was automatically just cause when

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[12] The rules are appended to the Court of Appeals' decision and appear in Appendix A, at pp. 22a-24a.

Woolworth itself did not see fit to include Rule 10 among "CAUSES FOR DISCHARGE."

Moreover, in practice, if an employee violated the call-in requirement of Rule 10 but the cause of the absence was hospitalization, or an injury due to an automobile accident or work-related accident, or other extenuating circumstances, the employee would not be discharged. (Appendix A at p. 4a; Appendix G at p. 44a.) These other circumstances could all be called "technical violations" because they go against the literal provisions of Rule 10. However, the Company's practice was to overlook them. Thus not only did the different headings of the rules and the cross-reference in Rule 19 create an ambiguity but, in addition, the practice of the parties modified the literal language of the contract to the extent that the arbitrator could reasonably conclude that discharge was not an appropriate penalty under the circumstances of the case.[12]

The Seventh Circuit also found "several reasons for interpreting the contract in a way which resolved the ambiguity against [the petitioner.]" (Appendix A at p. 19a.) Thus, Woolworth was aware of the reasons for each grievant's absence and there was some confusion as to the dates they were to return to work. The arbitrator

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[12] The petitoner's argument that absent Article X the Company could have discharged any or all of the employees for a good reason, a bad reason, or no reason at all (Petition, p. 17) ignores the fact that its own rules did not permit such arbitrary action. If the rules preceded or were contemporaneous with Article X, then it is reasonable to infer that the reference to "any rule" related only to the rules which pertained to causes for discharge. If the rules postdated Article X, the rules reflect the Company's own understanding that Article X was not to be read literally. In any case, the contract is clearly ambiguous with respect to Article X.

also concluded that the Company did not investigate the reasons why the employees were not able to return on the dates originally agreed to. (Appendix A at pp. 19a-20a.) The arbitrator then concluded that the discharges were not for just cause and that the appropriate discipline was suspensions of some length. The arbitrator could make these determinations because this Court long ago recognized that collective bargaining agreements are generalized instruments which cannot spell out literally the resolution for every dispute. *Warrior & Gulf, supra,* at p. 578.

What the petitioner is asking this Court to do is strip the arbitrator of any discretion in interpreting the agreement, even in light of the Company's own practices and modifications. That is precisely what this Court decided against when it gave arbitrators broad discretion in interpreting labor agreements. This Court has held that arbitration awards must be enforced even if ambiguous and even if the reasoning is not apparent from the decision, as long as the award, taken as a whole, "draws its essence from the collective bargaining agreement." *Enterprise Wheel and Car Corp., supra,* at pp. 597-598.

The Court of Appeals concluded that the award was rational; that it drew its essence from the agreement; and that it must stand. In so ruling, the court below acted in full accordance with the prior decisions of this Court.

## CONCLUSION

For the foregoing reasons, the respondents respectfully request that the petition for a writ of certiorari to the Seventh Circuit be denied.

Respectfully submitted,

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